

FILED

JUL 26 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AURELIO MONTIEL DE LA LUZ; et al.,

Petitioners,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 05-72066

Agency Nos. A79-522-290
A79-521-416

MEMORANDUM^{*}

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted July 24, 2006^{**}

Before: ALARCÓN, HAWKINS, and THOMAS, Circuit Judges.

Aurelio Montiel De La Luz and his wife Gloria Juarez de Montiel, natives and citizens of Mexico, petition for review of the Board of Immigration Appeals' decision affirming the immigration judge's denial of their applications for

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

cancellation of removal.

We lack jurisdiction to consider the petitioners' challenge to the agency's discretionary determination that the male petitioner failed to demonstrate exceptional and extremely unusual hardship to his qualifying relatives. *See* 8 U.S.C. § 1252(a)(2)(B)(i); *Romero-Torres v. Ashcroft*, 327 F.3d 887, 892 (9th Cir. 2003); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002). To the extent petitioners raise a due process challenge to the hardship determination, we lack jurisdiction because the claim is not colorable. *See Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001) (indicating that an applicant may not create the jurisdiction Congress chose to remove simply by cloaking an abuse of discretion argument in constitutional garb).

The female petitioner contends that the BIA erred in concluding that she failed to establish ten years of continuous residence necessary to qualify for cancellation of removal, because she did not intend to leave the United States for more than ninety days. We reject petitioner's contention, and affirm the BIA's conclusion that the female petitioner's four month departure from the United States precluded her from establishing the requisite continuous physical presence

requirement of 8 U.S.C. § 1229(b)(d)(2).

**PETITION FOR REVIEW DISMISSED IN PART AND DENIED IN
PART.**